Supreme Court No. 200,719-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDING AGAINST

SANDRA L. FERGUSON,

Lawyer (Bar No. 27472).

ANSWERING BRIEF OF THE WASHINGTON STATE BAR ASSOCIATION

M Craig Bray
Bar No. 20821
Disciplinary Counsel

WASHINGTON STATE BAR ASSOCIATION
1325 4th Avenue, Suite 600
Seattle, Washington 98101-2539
(206) 239-2110

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I. COUNTERSTATEMENT OF THE ISSUES

1. Lawyer Sandra L. Ferguson (Respondent) appeared before a court in an ex parte proceeding without notice to the adverse party and presented a motion seeking injunctive relief and an order holding the adverse party in contempt of court. The hearing officer found that Respondent did so despite knowing that prior notice to the adverse party and hearing were required. Did the hearing officer and unanimous Disciplinary Board properly conclude that Respondent committed misconduct by doing so?

2. When Respondent discussed in her motion the legal authorities on which she relied, she concealed and omitted the portions of those authorities that required prior notice to the adverse party and a hearing before relief could be granted. The hearing officer found that she did so knowingly. Did the hearing officer and the unanimous Disciplinary Board properly conclude that Respondent committed misconduct by concealing relevant legal authority from the court?

3. Respondent made several factual misrepresentations in her ex parte motion, which led the court to believe that notice had been given when it had not and that the adverse party had not complied with a prior court order. The hearing officer found that the misrepresentations were the result of Respondent's negligence and overzealousness. Did the

hearing officer and Disciplinary Board properly conclude that Respondent committed misconduct by misrepresenting facts to the court?

4. A unanimous Disciplinary Board recommended that Respondent should be suspended for at least three months. Two Board members voted to recommend a six-month suspension. The Board found two aggravating factors and one mitigating factor. The Board also found that Respondent engaged in knowing dishonest conduct. Should the Court suspend Respondent for six months?

II. COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL FACTS

On November 27, 2007, the Washington State Bar Association (Association) filed a three-count Formal Complaint against Respondent alleging as follows:

> COUNT 1 – By presenting motions and supporting declarations, appearing and obtaining an *ex parte* Writ of Restitution, Order of Contempt and other relief without notice to the opposing party or opposing party's counsel, Respondent violated one or more of the former Rules of Professional Conduct (RPC): 3.5(b), 8.4(d), and 3.4(c).[1]
>
> COUNT 2 – By failing to disclose relevant facts to the Court during an *ex parte* appearance, Respondent violated former RPC 3.3(f).
>
> COUNT 3 – By obtaining an *ex parte* Writ of Restitution and other relief through deception and/or misrepresentation, Respondent

[1] The RPC were revised in September 2006. The former RPC are applied in this matter as the relevant events occurred prior to September 2006.

violated one or more of the following former RPC: 8.4(c) and 8.4(d).

Bar File (BF) at 1, 2.

On September 8 through 10, 2008, a disciplinary hearing was held before Hearing Officer Timothy J. Parker. BF 58 at 1. On November 25, 2008, the hearing officer filed his Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation. BF 54. On January 7, 2009, the hearing officer filed Amended Findings of Fact, Conclusions of Law, and Recommendation that made certain revisions, but did not change the recommended sanction. BF 58. He found, by a clear preponderance of the evidence, that Respondent committed the misconduct alleged in Counts 1 through 3. BF 58 at 2, 12. He applied Standards 6.13, 6.22, and 6.32 of the American Bar Association's Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards) to Respondent's misconduct, found aggravating factors of refusal to acknowledge wrongful nature of conduct and substantial experience in the practice of law and a mitigating factor of absence of prior disciplinary record, and recommended that Respondent be suspended from the practice of law for 30 days. BF 58 at 11-14.

On review, the Disciplinary Board modified Findings of Fact (FF) 16 and 17, but otherwise adopted the hearing officer's Findings of Fact

and Conclusions of Law, and unanimously increased the recommended sanction to a three-month suspension.[2] BF 77.

Respondent timely filed a notice of appeal under Rule 12.3(a) of the Rules for Enforcement of Lawyer Conduct (ELC).

B. SUBSTANTIVE FACTS

Respondent was admitted to practice law in the State of Washington on November 21, 1997. BF 58, FF 1.

1. The Fergusons and the Bransfords Filed Lawsuits Regarding Possession of Two Parcels of Real Property.

In early 2004, Andrew and Julianne Ferguson executed agreements to lease the Nantucket Inn with an option to buy from Douglas and Lynda Bransford. Exhibit (EX) 1, 3, 4. As part of the deal, the Fergusons transferred their equity in a rental house they owned (the house) to the Bransfords as a down payment, approximately $53,000, and gave the Bransfords possession of the house with the expectation that the Bransfords would assume the mortgage on it. EX 2, 4, 5; Transcript (TR) 414. After taking possession of the house, the Bransfords began making mortgage payments to the Fergusons, but the parties later agreed that the Bransfords should send the payments directly to the mortgage company, which they did. TR 419-20.

[2] Two Board members voted to recommend a six-month suspension. BF 77 n.1.

The Fergusons attempted to run a restaurant at the Nantucket Inn, but fell behind on lease payments. TR 22. The Bransfords tried but failed to assume the mortgage on the house. TR 420-21, 425.

In November 2004, the Bransfords served the Fergusons with a notice to pay rent or vacate the Nantucket Inn. TR 22; EX 6. The Fergusons vacated and rented another home. TR 427, 440. The Bransfords assumed possession of the Nantucket Inn and left the house in possession of their adult son. TR 22-23, 28. The Bransfords also sued the Fergusons seeking, among other things, to quiet title to the house. EX 8. Respondent, who is Andrew Ferguson's sister, entered a Notice of Appearance on behalf of the Fergusons on February 3, 2004, but did not file an answer to the Bransfords' complaint. EX 10; TR 44-45.

The Fergusons, represented by lawyer Stephen Schutt, then filed their own unlawful detainer action against the Bransfords seeking possession of the house. EX 12. Lawyer Doug Owens represented the Bransfords in both lawsuits. TR 23-24, 26. The Bransfords stopped making mortgage payments on the house after the Fergusons filed their unlawful detainer action. EX 14; TR 440.

At about the time they filed the unlawful detainer action, the Fergusons hired a bankruptcy lawyer who told them that it would be beneficial if they regained possession of the house before they filed

bankruptcy because they could then claim the equity in the house as a homestead exemption. TR 146, 150, 439. This information was relayed to Respondent. TR 152-53.

2. Hearings Were Held in the Fergusons' Unlawful Detainer Action and the Matters Ordered to Trial.

On March 17, 2005, the mortgage company sent a Notice of Intention to Foreclose to the Fergusons notifying them that the mortgage payment for February 2005 was overdue, that foreclosure proceedings would be initiated within 30 days unless the default was cured, and that "all remittances must be in the form of CERTIFIED FUNDS ONLY." EX 15. The Fergusons did not give the Bransfords a copy of the notice of intent until April 1. EX 24, 36.

On March 18, 2005, there was a hearing in the Fergusons' unlawful detainer action. EX 17.1. The court entered an order that "good cause exists for a further evidentiary hearing," required the Bransfords to make the February and March mortgage payments within 10 days, and scheduled a trial for March 30, 2005. EX 16.

On March 28, 2005, the Bransfords sent two personal checks to the mortgage company to cover the payments for February and March 2005. EX 60. They were not aware that they had to pay with certified funds since the Fergusons had not, by this time, provided them with a copy of

the notice of intent. TR 36; EX 24, 36. The checks were posted to the Fergusons' mortgage account on April 6, 2005. EX 60.

On March 30, 2005, Judge Rickert held another hearing. EX 22. The Fergusons' lawyer, Schutt, told the court that the mortgage company had not received the payments the Bransfords had been required to make. EX 22 at 1. The Bransfords' lawyer, Owens, told the court that the Bransfords mailed the mortgage payments on March 28 and offered to have Ms. Bransford testify to that effect. EX 22 at 1-2. After argument, Judge Rickert acknowledged that both sides had meritorious arguments for the house. EX 22 at 5. When Owens argued that the Bransfords had equitable title to the house and were entitled to possession, the Court stated "You have a point." EX 22 at 13. When Schutt argued that the statute of frauds applied, Judge Rickert replied "something tells me there's a partial performance relying on somebody else doing something and all of that." EX 22 at 14. Judge Rickert later stated:

> Well, I'm going to deny the writ. This thing needs to be set for trial on the underlying issues as soon as possible, but both sides are hanging out. [The Fergusons] don't have a house, and [the Bransfords] are paying the mortgage on what could be somebody else's house. . . . I wouldn't want to rule on anything today without a lot more testimony and comments and study on it. That's for sure. It's a fairly muddy situation.

EX 22 at 21-22. The court consolidated the two cases for hearing and required the Bransfords to keep making mortgage payments. EX 20.

After receiving the notice of intent on April 1, 2005, the Bransfords stopped payment on the personal checks they had mailed to the mortgage company. TR 77. But, the mortgage company was not notified of that until April 12, 2005. EX 60. Ms. Ferguson called the mortgage company on April 6 and 11 and asked whether the Bransfords had made the February and March mortgage payments yet. TR 464-66; EX 60. At the time of her calls, the mortgage company's records reflected that the payments had been made. EX 60.

3. Respondent Appeared in the Fergusons' Action and Sought an Ex Parte Order Restoring Possession of the House to the Fergusons and Holding the Bransfords in Contempt.

On April 6, 2005, Schutt advised the Fergusons by letter, also faxed to Respondent, that he would no longer represent them and explained the court's March 30, 2005 ruling:

> The defendant's most persuasive argument, which the judge did not comment upon, was Ferguson's [sic] ability to file bankruptcy if given possession and close out the Bransfords from further legal claim. The result of this ruling was to preserve the status quo.

EX 31; TR 209-10.

Respondent immediately substituted in for Schutt for the purpose of restoring possession of the house to the Fergusons, but did not give Owens notice of her appearance. EX 32; TR 52, TR 208-10. From April 6 through April 8, 2005, Respondent researched the relevant legal issues

and drafted pleadings designed to obtain possession of the house through an ex parte motion. TR 214-15, 217; EX 68, 69.

Respondent drafted a motion entitled "Plaintiffs Ex Parte Motion for Temporary Injunctive Relief; Motion for Relief From Order of Court in Unlawful Detainer Action Under CR 60(b); Motion Under § 7.21.030 for Finding of Contempt and Imposition of Remedial Sanctions, Including Costs and Attorney's Fees; Motion to Shorten Time For Show Cause Hearing" (ex parte motion). EX 33. Her ex parte motion sought an order of contempt under RCW 7.21.010 and 7.21.030, and for relief under Rules 60(b)(4) and 60(b)(11) of the Superior Court Civil Rules (CR), to wit:

> (1) a writ of restitution evicting the Bransfords from the house and returning possession to the Fergusons;
> (2) an order requiring the Bransfords to make mortgage payments;
> (3) an order holding the Bransfords in contempt; and
> (4) an award of attorney fees to the Fergusons.

EX 33 at 1-2 (copies of RCW 7.21.010, RCW 7.21.030, and CR 60 are attached as Appendix A).

Respondent's ex parte motion quoted the language of RCW 7.21.030(1), but omitted the second sentence that required notice and a hearing before relief could be granted. EX 33 at 10; compare RCW 7.21.030(1). Respondent also failed to reference the notice requirements

in CR 60(e). EX 33.[3] She never cited or referred to CR 65(b). EX 33.

Respondent prepared her own declaration supporting her motion, dated April 7, 2005. EX 35. As to notice, her declaration stated:

> I have not yet had time to provide notice of this motion to Doug Owens, Defendant's counsel, because of the exigency of the circumstances...Therefore, I must scan this motion and send it to my clients tonight (this morning) so that they can seek the noting of a hearing later today [April 8th], for the earliest possible date. I intend to take steps to ensure that Mr. Owens receives notice of the hearing as soon as possible by having my clients deliver a copy of the motion, as soon as possible.

EX 35 at 2. But Respondent did not scan the ex parte motion and send it to the Fergusons that night and did not make any other effort to serve her pleadings on Owens or give him advance notice of her intent to appear before the court. TR 241, 373-76, 542-47; BF 58, FF 15.

On Friday April 8, 2005, Respondent contacted the court administrator about scheduling an emergency hearing on relief and was

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[3] CR 60(e) provides the following procedure for providing notice to affected parties:
(2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.
(3) Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

told that emergency motions were heard on Fridays. TR 543. She then decided to drive to Bellingham on Monday April 11, 2005, and attempt to be heard by the court ex parte. TR 544-46.

4. Respondent Obtained a Writ of Restitution and Order of Contempt Without Prior Notice to the Opposing Party.

Respondent presented her ex parte motion, supporting declarations, and proposed orders – 80 pages total – to the court on April 11, 2005. TR 546-48; EX 33-40. She still had not given Owens any notice, despite the statements in her declaration. BF 58, FF 15; TR 547. But she did not clearly disclose to the court the lack of notice. She stated in a pre-hearing deposition that she could not recall if she told the judge she had not given notice; she said she referred the judge to her motion. TR 394; EX 74. In a May 4, 2005 letter to the Association, Respondent consistently said that when Judge Rickert inquired about notice to the opposing party, she referred him to the statements in her declaration, EX 73 at 3, which, as noted above, implied she had given notice on April 8 when she had not. EX 35; TR 547. Respondent attempted to claim at hearing that she specifically told Judge Rickert that she had not given notice, TR 393, but, when questioned further on this point, she admitted that she did not "say those exact words, no." TR 386.

Judge Rickert entered an ex parte order prepared by Respondent

and an order and Writ of Restitution prepared by Schutt that Respondent brought with her. EX 38, 39, 40; TR 554, 577. These orders gave possession of the house to the Fergusons under CR 60(b) and awarded remedial sanctions for contempt under RCW 7.21.030, including requiring the Bransfords to pay all arrearages on the mortgage and awarding reasonable attorney fees to the Fergusons. EX 38, 39. Respondent's orders did not set a future hearing date. EX 38, 40.

On April 13, 2005, Respondent served Owens for the first time with her ex parte motion and supporting declarations, the orders, the writ of restitution, and her notice of appearance. TR 48-50, 555. This was also Owens's first notice that Respondent had substituted in as counsel for the Fergusons. TR 52. On that same day, Respondent informed the Fergusons' bankruptcy lawyer that "the eviction proceedings are ongoing at this time," and sent that lawyer an email stating in part:

> I just wanted to let you know that I have placed in the mail this morning, a check in the amount of $834.00 so that the personal bankruptcy of my clients [the Fergusons] can proceed forthwith. They should be back into the house by tomorrow. Julianne is bringing the signed documents by your office today, which would allow you to file.

EX 42.

On April 15, 2005, the Bransfords sent the mortgage company a certified check paying the arrearage in the house's mortgage. EX 47; TR

279. Possession of the house was nevertheless restored to the Fergusons. TR 49-50, 125. On April 22, 2005, Owens filed on behalf of the Bransfords a Motion to Vacate Writ of Restitution, Nunc Pro Tunc, To Restore the Premises to the Defendants, and For Attorneys Fees. EX 46. The motion to vacate was scheduled for hearing on May 6, 2005. EX 49. But the Fergusons filed bankruptcy on May 5, 2005, terminating any state court action. EX 56, 57.

After the Fergusons filed bankruptcy, the Bransfords filed an adversary action, but the matter was later settled and they received nothing from the house. TR 69-70; BF 58, FF 27. At a minimum, they lost their claim to the $53,000 in equity in the house that the Fergusons had paid as a down payment and the $2,242.10 mortgage payment they made on April 15, 2005. See EX 4, 47.

III. ARGUMENT

A. STANDARD OF REVIEW

"When challenged on appeal, a hearing officer's findings of fact will be upheld where they are supported by substantial evidence." In re Disciplinary Proceeding Against Guarnero, 152 Wn.2d 51, 58-59, 93 P.3d 166 (2004). Substantial evidence exists if the record contains "evidence in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise." In re Disciplinary Proceeding Against Bonet, 144

Wn.2d 502, 511, 29 P.3d 1242 (2001). The substantial evidence standard of review requires the reviewing body to view the evidence and the reasonable inferences therefrom "in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority." Ongom v. Dep't of Health, 124 Wn. App. 935, 949, 104 P.3d 29 (2005), rev'd on other grounds, 159 Wn.2d 132, 148 P.3d 1029 (2006). An attorney challenging factual findings on appeal must do more than "argue his version of the facts while ignoring testimony by other witnesses that supports each finding." In re Disciplinary Proceeding Against Kronenberg, 155 Wn.2d 184, 191, 117 P.3d 1134 (2005).

The credibility and veracity of witnesses are best determined by the hearing officer before whom the witnesses appear and testify. In re Disciplinary Proceeding Against Selden, 107 Wn.2d 246, 251, 728 P.2d 1036 (1986). Consequently, the Court will not substitute its evaluation of the credibility of witnesses for that of the hearing officer. See In re Disciplinary Proceeding Against Egger, 152 Wn.2d 393, 406, 98 P.3d 477 (2004). Furthermore, the hearing officer is entitled to draw reasonable inferences from the documents and testimony. See, e.g., In re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 82, 101 P.3d 88 (2004). Circumstantial evidence is as good as direct evidence for these purposes. Kronenberg, 155 Wn.2d at 191. And the hearing officer's determination

of state of mind is a factual determination to be given great weight on review. In re Disciplinary Proceeding Against Longacre, 155 Wn.2d 723, 744, 122 P.3d 710 (2005).

The Court will uphold the hearing officer's conclusions of law if they are supported by the findings of fact. In re Disciplinary Proceeding Against Haley, 157 Wn.2d 398, 406, 138 P.3d 1044 (2006).

The Court gives serious consideration to the Board's recommended sanction and will hesitate to reject a unanimous recommendation in the absence of clear reasons for doing so. In re Disciplinary Proceeding Against Poole (Poole II), 164 Wn.2d 710, 723, 193 P.2d 1064 (2008). And where the sanction recommendations of the hearing officer and the Disciplinary Board differ, the court gives greater weight to the Board because "the Board is the only body to hear the full range of disciplinary matters and has a unique experience and perspective in the administration of sanctions." In re Disciplinary Proceeding Against Cohen, 150 Wn.2d 744, 754, 82 P.3d 224 (2004).

B. THE HEARING OFFICER PROPERLY DETERMINED THAT RESPONDENT KNOWINGLY FAILED TO GIVE REQUIRED PRIOR NOTICE BEFORE APPEARING BEFORE THE COURT EX PARTE (AS CHARGED IN COUNT 1)

As she did below, Respondent argues that she did not knowingly fail to give required notice to the Bransfords before appearing before the

court ex parte because she relied on CR 65(b) in bringing her ex parte motion, and that rule permitted her to appear before the court without prior notice. Respondent's Brief (RB) at 21-27. But the hearing officer did not credit her testimony that she was proceeding under CR 65(b), nor was he required to. BR 58, FF 25; In re Disciplinary Proceeding Against Whitt, 149 Wn.2d 707, 722, 72 P.3d 173 (2003) ("[A] hearing officer is not bound by various explanations if he or she is not persuaded by them."). Instead, he found that Respondent knowingly violated RPC 3.4(c), 3.5(b), 8.4(c) and 8.4(d) by seeking and obtaining relief under CR 60 and RCW 7.21.030 in an ex parte hearing despite knowing that those authorities required prior notice to the adverse party and a hearing. BF 58, FF 9-12, 25-26, CL Count 1. The hearing officer's decision on this issue is supported by substantial evidence, which is discussed below.

1. Respondent never cited or argued CR 65(b), contrary to her claim that she was always relying on it.

Despite her claim that she was relying on CR 65(b) when she brought her ex parte motion before the court, Respondent never cited that rule in her motion or the declarations she filed in support of it. Instead, she cited and sought relief under CR 60 and RCW 7.21.030. EX 33, 34, 35, 36, 37. And the order she presented to the court did not indicate that relief was being granted under CR 65(b); it also stated that relief was

granted under CR 60(b) and RCW 7.21.030. EX 38. CR 60(b) provides a method for relieving a party from a final judgment or order. RCW 7.21.030 allows a court to impose a remedial sanction for contempt of court. Both these rules require prior notice and hearing before that relief can be granted. CR 60(e); RCW 7.21.030(1).

Despite her failure to cite CR 65(b) in her motion, Respondent still claims she was always seeking relief under that rule. RB at 25; TR 233, 360. But when she, in her motion, set out the substantive test for obtaining the relief she sought, she did not cite the test set out in CR 65(b) for the granting of a temporary restraining order without notice to the adverse party.[4] Instead, she cited and argued the four-part test for obtaining a preliminary injunction, which is different.[5] EX 33 at 12-14. Nowhere in her ex parte motion or the order she presented to the court is

[4] A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. CR 65(b).

[5] Her motion cited 15 Wash. Prac., Civil Procedure § 44.11 and listed the substantive requirements for the granting of preliminary injunctive relief, which are (1) a clear legal or equitable right to the property at issue; (2) a strong likelihood of prevailing on the merits; (3) irreparable harm without adequate remedy at law to the party harmed; (4) the need for the Court to maintain or preserve the status quo until ultimate resolution of the parties' claims. EX 33 at 12-14.

there any indication that Respondent was relying on CR 65(b) or seeking a temporary restraining order. EX 33, 38.

2. Respondent sought permanent injunctive relief and an order of contempt ex parte, not a temporary restraining order authorized by CR 65(b).

Respondent repeatedly stated in her ex parte motion that she was seeking injunctive relief, not the temporary restraining order authorized by CR 65(b). See, e.g., EX 33 at 12. And the order she presented to the court did not provide that it expired within 14 days, or ever. EX 38; CR 65(b) (every temporary restraining order issued without notice to the adverse party must expire within 14 days). Instead, the order Respondent presented granted immediate injunctive relief without the scheduling of a subsequent hearing. EX 38. But injunctive relief may only be ordered after notice and hearing.[6] CR 65(a)(1); Davis v. Gibbs, 39 Wn.2d 180, 184-85, 234 P.2d 1071 (1951); Fisher v. Parkview Properties, 71 Wn. App. 468, 474, 859 P.2d 77 (1993).

Respondent's ex parte motion also sought relief from the court's prior order and an order holding the Bransfords in contempt and requiring

[6] Respondent alternately termed the relief she sought as either a temporary or preliminary injunction. EX 33 at 1, 12. A temporary injunction is the same as a preliminary injunction, and neither is the same as a temporary restraining order. See 4 Karl B. Tegland, Washington Practice: Rules Practice, CR 65 at 612 (5th ed. 2006).

them to pay costs and attorney fees. EX 33; EX 38. While CR 60(b) and RCW 7.21.030 authorize those types of relief, they both require prior notice and hearing before relief can be granted. CR 60(e); RCW 7.21.030(1). As the hearing officer noted, CR 65(b) does not obviate the notice requirements of CR 60 and RCW 7.21.030. BF 58, FF 25.

Respondent argues that it was not improper for her to seek relief from judgment and an order of contempt ex parte because "CR 65(b) does not restrict what relief can be asked for in a TRO." RB at 26-27. But a temporary restraining order may only issue on a showing of clearly apparent immediate and irreparable injury, security must be given by the applicant, the order shall define the injury, state why it is irreparable and why the order was granted without notice, and shall expire by its terms within no more than 14 days. CR 65(b), CR 65(c). Respondent's ex parte motion did not note these provisions of CR 65(b), and the order she presented did not comply with any of these requirements. EX 33, 38. Further, the order did not "restrain" the Bransfords from doing anything, it granted affirmative relief to the Fergusons.

3. Respondent knew that prior notice and hearing were required by CR 60 and RCW 7.21.030, the authorities on which she actually relied, but nevertheless proceeded without giving notice.

Respondent argues that any misconduct was merely the result of

inexperience and terrible drafting. RB at 18-19. The hearing officer did not accept this excuse. BF 58, FF 10, 12, 13, 26, 29. Respondent knew of the differences between the relief afforded by the different authorities at issue, and of the notice requirements of CR 60(e) and RCW 7.21.030(1), because she conducted legal research when preparing her ex parte motion. BF 58, FF 9, 10, 12; TR 214-15 (Respondent testified that she performed research when drafting her motion), 218-19, 225 (Respondent admitted reviewing RCW 7.21.030 and CR 60 during her research and knowing that they required prior notice); EX 68, 69 (printed results of the research).

On this evidence, the hearing officer could properly conclude that, contrary to her assertion, Respondent never sought relief under CR 65(b), but instead sought to obtain immediate injunctive relief under CR 60(b) and RCW 7.21.030 in an ex parte proceeding despite knowing that those authorities required prior notice and hearing, thereby violating RPC 3.4(c) (knowingly disobey an obligation under the rules of a tribunal), RPC 3.5(b) (improper ex parte communication with a judge), and RPC 8.4(d) (conduct prejudicial to the administration of justice). Whitt, 149 Wn.2d at 722; ("[A] hearing officer is not bound by various explanations if he or she is not persuaded by them."); Longacre, 155 Wn.2d at 744 (hearing officer's determination of state of mind is given great weight on review). The Court should adopt the findings and conclusions of the hearing officer

and the unanimous Disciplinary Board related to Count 1.

C. THE HEARING OFFICER PROPERLY CONCLUDED THAT RESPONDENT OBTAINED EX PARTE RELIEF THROUGH MISREPRESENTATION AND DECEPTION (AS CHARGED IN COUNT 3)

Respondent challenges the conclusion of the hearing officer and the unanimous Disciplinary Board that she violated RPC 8.4(c) (dishonest conduct) and RPC 8.4(d) (conduct prejudicial to the administration of justice) by knowingly obtaining improper ex parte relief, including a Writ of Restitution, through deception and misrepresentation, i.e., by failing to provide the trial court with the legal authority that required notice to an adverse party before the court could grant the relief she sought. RB at 35-39; BF 58, CL Count 3. The findings and conclusions on this issue are supported by substantial evidence.

1. Respondent knowingly concealed and omitted from her ex parte motion the portions of CR 60 and RCW 7.21.030 that required prior notice to the adverse party.

Respondent attempts to recast her misconduct as merely an accidental failure to cite relevant law to the court. RB at 36. But the hearing officer rejected this claim and instead found that she knowingly concealed from the court the notice portions of the statute and rule she relied on by purposely omitting them. BF 58, FF 10-12, CL Count 3. That decision is supported by substantial evidence discussed below.

As noted above, Respondent brought her motion for temporary

injunctive relief under CR 60(b) and RCW 7.21.030. EX 33. Both authorities require prior notice and hearing before relief under them can be granted. CR 60(e)(2); RCW 7.21.030(1). Respondent testified that she spent hours researching the relevant legal issues and preparing her motion prior to the ex parte hearing before Judge Rickert. TR 214-15, 218-19, 225. The results of Respondent's research show that she reviewed CR 60 and RCW 7.21.030 and knew that those authorities required prior notice and hearing before relief is granted. EX 68 and 69; BF 58, FF 10, 12. But when Respondent cited those authorities in her motion, she omitted the portions of them that state prior notice and hearing are required. Her motion quoted RCW 7.21.030 as follows:

> (1) The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related.
>
> (2) If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:
>
> . . . .
>
> **(c) An order designed to ensure compliance with a prior order of the court;**
>
> **(d) Any other remedial sanction other than the sanctions specified [in this subsection] if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.**

> (3) The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees.

EX 33 at 10 (emphasis in original). Comparison of Respondent's motion with the statute shows that she omitted the second sentence of RCW 7.21.030(1), which states that "Except as provided in RCW 7.21.050, the court, after notice and hearing, may impose a remedial sanction authorized by this chapter." (emphasis added). Not only did she omit that sentence, she did not indicate that anything was missing, even though she used ellipses and brackets to indicate omissions from and changes to subsection (2). BF 58, FF 11; EX 33 at 10.

Also, when Respondent discussed CR 60 in her motion, she failed to mention CR 60(e)(2), which requires the court to first enter an order to show cause and then hold a hearing before granting relief from judgment. EX 33 at 14-15. She omitted that subsection, titled her motion as an ex parte motion, and proceeded as though it were proper for the court to grant relief under CR 60 without notice and hearing. EX 33; TR 577. She also presented an order that did not set a show cause hearing in the near future, but instead granted permanent relief without the need for any additional hearing. EX 38.

Although Respondent claimed at hearing that she could not remember deciding to leave the second sentence of RCW 7.21.030(1) out, TR 220, the hearing officer could properly reject her claim and instead conclude that her deletion of the "notice and hearing" language of RCW 7.21.030(1) without indication and her consistent omission of the notice requirements of CR 60(e) was deceptive. In re Disciplinary Proceeding Against Eugster, 166 Wn.2d 293, 336, 209 P.3d 435 (2009) (deference is given to the hearing officer who is the only adjudicative body to have the opportunity to listen to the witnesses, assess their demeanor, talk to the charged attorney, and make credibility findings); VanDerbeek, 153 Wn.2d at 82 (a hearing officer is entitled to draw reasonable inferences from the documents and testimony); Whitt, 149 Wn.2d at 722.

2. Respondent was not merely seeking a hearing date when she appeared before the court; she was seeking a writ of restitution and an order of contempt.

In support of her argument that the hearing officer erred in finding that she knowingly concealed relevant law from the court, Respondent argues that her only purpose in traveling from Seattle to the court in Mt. Vernon on April 11, 2005, was to obtain a show cause order for the contempt proceeding so that notice and hearing requirements could be met, and that she was surprised that the judge went ahead and heard her motion. RB at 37, 44. But, as noted above, the proposed order she

brought with her and presented to the court was not merely an order to show cause that scheduled a show cause hearing in the future. It was an order that relieved the Fergusons from the court's prior order, permanently returned possession of the house to them, and held the Bransfords in contempt and required them to pay costs and attorney fees. EX 38; CR 60(e)(2); RCW 7.21.030(1). This controverts her claim that she was only seeking an order to show cause and the setting of a hearing date in the near future.

Further, while Respondent initially testified that when she traveled to Mount Vernon she hoped to get a hearing within a day or two, TR 544, she later admitted that she told the clerk of the court she wanted to go ahead and present her motion to the judge because she came all the way from Seattle and wanted him to consider it so she would not have to travel back to Mount Vernon later. TR 546. Respondent was also impeached at hearing with prior deposition testimony, wherein she testified that she hoped to get her motion heard without prior notice to the Bransfords:

> Q. [by Mr.Burke] Directing your attention to your deposition transcript which is in front of you, would you look at that on page 48, starting at line 12:
>
> > Question: So when you went into court that day, in your mind you thought maybe you might be able to get this before the court without notice to Mr. Owens?...
> >
> > Answer: I hoped I would. I hoped I would be able to get in to get the emergency relief we needed because if I

had to wait, as the person on the phone told me, for regular noting of a motion, it would be too late.

Am I reading that correctly?

A. [by Respondent] Yes.

TR 384-85. This testimony contradicts both her claim that she was merely seeking the setting of a show cause hearing within a day or two and her claim of surprise.

3. When the court asked about notice, Respondent deceptively avoided the issue.

Respondent argues that it is was error to conclude that she could deceive the court about the requirement of notice and hearing by omitting that from her ex parte motion because notice is a "fundamental right . . . so basic and will [sic] known it is not contrary to the administration of justice not to have cited that portion of the statute," and to conclude otherwise would be "insulting to the judge and not credible." RB at 38-39. But Respondent not only omitted the relevant portions of CR 60 and RCW 7.21.030, she also misled the court about whether notice had been given. Judge Rickert explicitly asked her about attempts to give notice to the Bransfords. TR 386. In response, Respondent did not tell the judge that she had not given notice; instead she directed the judge to her supporting declaration, in which she implied that she had given notice on April 8 when she had not. TR 386-87, 394; EX 35 at 2; EX 73 at 3; EX 74.

In referring the court on April 11 to a declaration that indicated she was going to provide advance notice as soon as possible after April 7, when in fact she had made no effort to provide notice, Respondent led the court to believe notice had been given. On this evidence, the hearing officer reasonably could find that she falsely stated in her declaration that the exigency of the circumstances prevented her from providing notice. BF 58, FF 19. She had time to do so, but chose not to.

After considering all of the evidence, the hearing officer properly could conclude that Respondent knowingly failed to provide the court with relevant legal authority that required prior notice and hearing before the relief she sought could be granted, and thereby violated RPC 8.4(c) and RPC 8.4(d). Longacre, 155 Wn.2d at 744; VanDerbeek, 153 Wn.2d at 82. The Court should adopt the findings and conclusions of the hearing officer and the unanimous Disciplinary Board as to Count 3.

4. RCW 59.12.090 is inapplicable.

Respondent contends, for the very first time, that Count 3 must be dismissed because RCW 59.12.090 allowed her to seek an ex parte writ of restitution for the house at any time. RB at 37-38. Because this claim was not presented to the hearing officer, the Court need not consider it. In re Disability Proceeding Against Diamondstone, 153 Wn.2d 430, 442, 105 P.3d 1 (2005) (claim not presented to the hearing officer was not

considered because the Association did not have an opportunity to develop facts at the hearing necessary to address it).

In any case, the existence of RCW 59.12.090 does not excuse Respondent's failure to provide prior notice of her attempt to obtain relief from judgment under CR 60 and an order of contempt under RCW 7.21.030, which both require prior notice. And, as with CR 65(b), Respondent did not cite or rely on this statute in her ex parte motion or her order. See EX 33, 38.

Further, when Respondent cited RCW 59.12.090 in her opening brief before this Court, she omitted without signal the portion of the statute that indicates a bond must be posted before a prejudgment writ of restitution may issue:

> [B]efore any writ shall issue prior to judgment the plaintiff shall execute to the defendant and file in court a bond in such sum as the court or judge may order, with sufficient surety to be approved by the clerk, conditioned that the plaintiff will prosecute his action without delay, and will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the writ of restitution having been issued, should the same be wrongfully sued out.

RB at 38; compare RCW 59.12.090. There is no evidence in the record that Respondent made any effort to notify the court of the bond requirement, have the court set the amount of such bond, or have her clients post a bond as a condition precedent to obtaining a pre-judgment

writ of restitution before asking the court to enter the writ. It was improper to seek a writ of restitution without doing so. RCW 59.12.090 is merely additional proof that Respondent improperly failed to provide the court with relevant legal authority before asking it to act.

D. THE HEARING OFFICER PROPERLY CONCLUDED THAT RESPONDENT MADE MULTIPLE MISREPRESENTATIONS TO THE COURT (AS CHARGED IN COUNT 2)

As set out above, the hearing officer and unanimous Disciplinary Board found that Respondent improperly sought permanent injunctive relief in an ex parte proceeding despite knowing prior notice to the adverse party was required, and deceived the court by knowingly omitting from her ex parte motion relevant portions of the authorities on which she relied. The hearing officer and unanimous Disciplinary Board also found that Respondent negligently misrepresented the actions of the Bransfords and other facts to the court in violation of RPC 3.3(f), as charged in Court 3. BF 58, FF 21, CL Count 2; BF 77. Respondent argues that the hearing officer and Disciplinary Board erred in so finding. RB at 30-35. But the findings of the hearing officer on this count are again supported by substantial evidence.

Respondent made four factual misrepresentations in her ex parte motion. Respondent's first misrepresentation was:

On March 30, 2005, the expedited hearing on the unlawful detainer

> action was before this Court . . . Upon request by the Court for proof of mailing or payment [of the mortgage payments], the Bransfords had no such proof that the payments had been made.

EX 33 at 6; BF 58, FF 21. This statement was false because Owens made an offer of proof at the March 30, 2005 hearing that Ms. Bransford would testify that she mailed the payments on March 28th. BF 58, FF 21. Ms. Bransford's proffered testimony was evidence. Ms. Bransford had mailed the payments, and they were posted to the Fergusons' mortgage account on April 6, the date that Respondent signed her ex parte motion. EX 30, 33, 60. Had Respondent called the mortgage company and inquired herself, she would have discovered this, but she did not. TR 371-72.

Respondent's second misrepresentation was:

> [A]fter the Bransfords failed to comply with the Court's order of March 18th they made false representations to the Court on March 30, 2005. . . . the Bransfords falsely represented to the Court that Mrs. Bransford had posted the payments for February and March, on or before March 28, 2005,....

EX 33 at 8. This statement was false because, as noted above, the Bransfords had mailed the payments and the mortgage company had credited the payments to the Fergusons' mortgage account on April 6. BF 58, FF 21; EX 30, 60. Ms. Ferguson testified that she was calling the mortgage company almost every day, including April 6 and April 11, that she was told that no payments had been received, and relayed that to Respondent. TR 464-67; EX 60. But as of April 11, the mortgage

company records showed that the Bransfords payments had posted to the mortgage account on April 6, the same day Respondent began frantically preparing her ex parte motion, and Ms. Ferguson would have been told that. EX 60; TR 277, 285-86, 370. The hearing officer could properly reject Ms. Ferguson's testimony and Respondent's argument and instead conclude that Respondent had negligently misrepresented the facts. VanDerbeek, 153 Wn.2d at 82.

The third misrepresentation was:

> On March 30, 2005 the Bransfords . . . falsely stated to the Court that they had complied with the Court's order dated March 18, 2005, requiring payment of February and March rent or mortgage in order to bring the mortgage up to date.

EX 33 at 14. This statement tracked the first and second misrepresentations and was itself false because it misrepresented that the Bransfords themselves had made false representations, when in fact they had not testified at the March 18 hearing. And the statement again falsely represented that the Bransfords had not made the payments when in fact they had. BF 58, FF 21; EX 22, 30, 33, 60.

The fourth misrepresentation was:

> Although the Court, on March 30, 2005, did not restore possession of the house to the Fergusons, the Bransfords do not currently occupy the house either. Instead, it appears they have allowed a vagrant or indigent person to move into the property and "squat" there.

EX 33 at 11. This statement was false because the person living in the

house was the Bransfords' adult son, and he was living there with their permission. BF 58, FF 21. Respondent knew the person living in the house was the Bransfords' son because Mr. Ferguson told her that. EX 37 at 6; TR 212. Mr. Ferguson stated more than once that he knew that the Bransfords had allowed their son to live in the house and did not believe the son was a vagrant. TR 115, 118; EX 61. And the Fergusons' prior lawyer, Schutt, admitted at the March 30 hearing that the Bransfords had moved their son into the house. EX 22 at 6-7. But Respondent did not mention in her ex parte motion that the person living in the house was the Bransfords' son. BF 58, FF 21; EX 33. Instead, she said the Bransfords had "relinquished possession" to a "vagrant or indigent person" who appeared to be "'squatting' on the premises" and twice cited the court to paragraphs 17-19 of Mr. Ferguson's declaration, where she had written that Mr. Ferguson had found "evidence of a squatter living in the bedroom upstairs." EX 33 at 5, 11-12; EX 37 at 4.[7]

A squatter is defined as a person who settles on property without any legal claim or title. Black's Law Dictionary 1439 (8th ed. 2004). Respondent argues that her statement that a vagrant squatter had moved

[7] She buried the fact that the person living in the house was the Bransfords' son at paragraph 31 of Mr. Ferguson's declaration; even then she said that the "vagrant may be their adult son." EX 37 at 6. In her 80 pages of pleadings, she never directed the court's attention to that information. See, e.g., EX 33.

into the house was a true statement. RB at 33. But under no definition could the Bransfords' adult son be characterized as "squatting" on the property because the Bransfords were legally in possession of the house, had a legal claim to it, and had allowed their son to live there. TR 28; EX 22 at 6-7. There was no evidence that he was either indigent or a vagrant. TR 115, 118. There was also no evidence that the Bransfords had relinquished possession of the house to someone other than their son. By making this obviously false statement, Respondent was attempting to convince the court that Bransfords had wholly abandoned the house.

The hearing officer found that these misrepresentations were the result of negligence and overzealousness. BF 58, FF 22. It appears he was being generous, as the net effect of Respondent's many misrepresentations was to lead the court to believe the Bransfords had refused to comply with the court's prior order regarding the house when they had complied, had lied to the court when they had not, and had abandoned the house to waste and hostile occupation by a homeless person when they had not. Respondent made no effort to verify that her representations were true and ignored true facts of which she was aware. She disregarded the truth in furtherance of her attempt to return possession of the house to the Fergusons immediately so that they would be in an advantageous position when they declared bankruptcy. See TR 394-95;

BF 58, FF 6.

Respondent argues that her misrepresentations were merely argument and that she reported the facts as they were. RB at 32-33. But an attorney's duty of candor is at its highest when opposing counsel is not present to disclose contrary facts or expose deficiencies in legal argument. In re Disciplinary Proceeding Against Carmick, 146 Wn.2d 582, 595, 48 P.3d 311 (2002). On this evidence, the hearing officer and Disciplinary Board could reasonably find that Respondent made negligent misrepresentations to the court and conclude that she thereby violated RPC 3.3(f). The Court should not disturb this determination.

E. THE COURT SHOULD AFFIRM AND ADOPT THE RECOMMENDED SANCTION OF SUSPENSION, BUT INCREASE THE TERM TO SIX MONTHS.

Application of the ABA Standards to arrive at a disciplinary sanction is a two-stage process. First, the presumptive sanction is determined by considering (1) the ethical duty violated, (2) the lawyer's mental state, and (3) the extent of the actual or potential harm caused by the misconduct. In re Disciplinary Proceeding Against Dann, 136 Wn.2d 67, 77, 960 P.2d 416 (1998). Second, the ultimate sanction is arrived at by considering any aggravating or mitigating factors that might alter the presumptive sanction. Id. Here, the hearing officer and unanimous Disciplinary Board applied three separate ABA Standards and determined

that suspension was the appropriate presumptive sanction. BF 58 at 13-14; BF 77.

Respondent does not challenge the application of specific ABA Standards. Instead, she challenges the hearing officer's findings of mental state and injury that underlie the choice of Standards. RB at 45-47. As set forth above in Parts III. B, C, and D of this brief, the findings of mental state were supported by substantial evidence. We will not argue them further here. We address injury and application of the ABA Standards below.

1. The hearing officer and Disciplinary Board correctly found that Respondent's conduct injured the Bransfords and that the presumptive sanction is suspension.

The hearing officer applied ABA Standards 6.22 and 6.32 to Respondent's knowing disregard of the requirement that she give notice before appearing in court seeking relief under CR 60 and RCW 7.21.030, and knowing failure to provide relevant legal authority to the court:

> 6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.
>
> 6.32 Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

BF 58 at 13. The hearing officer applied ABA Standard 6.13 to Respondent's conduct in making negligent misrepresentations to the court:

> 6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Id.

With respect to injury, Respondent argues that there is no evidence that her misconduct caused the Bransfords any additional legal expense or other injury. RB at 45. But the finding of injury by the hearing officer and Disciplinary Board is supported by substantial evidence. Respondent's conduct injured the Bransfords by causing them to incur additional cost and depriving them of their day in court and opportunity to make legal and equitable arguments. TR 71-74; BF 58, FF 27; BF 77 at 1-2 (FF 16-17). It potentially interfered with the legal process because, had prior notice been provided and the Bransfords been able to appear, the court may not have granted the relief Respondent obtained on April 11, 2005. BF 77 at 2 (FF 17). Respondent's conduct also caused the Bransfords to lose their claim to the equity in the house. Shortly after obtaining the ex parte order and writ of restitution giving the Fergusons possession of the house, Respondent contacted the Fergusons' bankruptcy

lawyer, notified that lawyer that bankruptcy needed to proceed "forthwith," and paid the costs of filing. EX 42. The Bransfords filed a motion to vacate the ex parte order and writ of restitution and noted a hearing for May 6, 2005. EX 46, 49. But the Fergusons filed for bankruptcy on May 5, 2005, EX 56, 57, an act that terminated review by the state court and forced the striking of the Bransfords' motion to vacate. TR 69. When the Bransfords attempted to contest the matter in the bankruptcy case, the Fergusons improperly recorded their option to buy the Nantucket Inn, clouding title to it at a time when the Bransfords had a potential buyer, forcing the Bransfords to settle and give up their claim to the $53,000 equity in the house even though they were entitled to it under the original deal with the Fergusons. TR 69-71, 174-78; EX 4, 5. They also lost the $2,242.10 mortgage payment they made on April 15, 2005. EX 47. These losses were the direct result of Respondent's actions.

The Court should adopt the finding of the hearing officer and the Disciplinary Board that Respondent's misconduct injured the Bransfords and their conclusion that the presumptive sanction for the violations charged in Counts 1 and 3 is suspension and is reprimand for Count 2.

2. The hearing officer and Disciplinary Board properly applied the aggravating factor of refusal to acknowledge the wrongful nature of conduct.

Aggravating and mitigating factors may support deviation from the

presumptive sanction. The hearing officer and Disciplinary Board found that the following aggravating factors listed in ABA Standard 9.22 applied in this matter:

(g) refusal to acknowledge wrongful nature of conduct; and
(i) Substantial experience in the practice of law,

and that the following mitigating factor from ABA Standard 9.32 applied:

(a) absence of a prior disciplinary record.

BF 58, FF 28-30. The Disciplinary Board agreed. BF 77.

Respondent argues that the hearing officer erred in applying the aggravating factor of refusal to acknowledge the wrongful nature of her conduct because it "essentially punishes" her for contesting the allegations against her. RB at 45.

Respondent's argument is erroneous. This aggravating factor applies when the lawyer admits the conduct but asserts that it was nevertheless not wrongful or tries to rationalize improper conduct as an error. See In re Disciplinary Proceeding Against Holcomb, 162 Wn.2d 563, 588, 173 P.3d 898 (2007) (citing Kronenberg, 155 Wn.2d at 196 n.8; and In re Disciplinary Proceeding Against Dynan, 152 Wn.2d 601, 621, 98 P.3d 444 (2004)). Here, Respondent admits her conduct, but rationalizes it by asserting that she always believed she was relying on CR 65(b) in bringing her ex parte motion and that it authorized her to do what she did. But the hearing officer properly rejected this clam because there is no

evidence that Respondent did rely on CR 65(b) at the time; she is attempting to use CR 65(b) as an after-the-fact excuse. And now, for the first time, she cites RCW 59.12.090 in a similar after-the-fact attempt to justify her conduct. RB at 37-38.

Additionally, Respondent's unwillingness to acknowledge that her conduct amounted to a violation of the RPC speaks to the likelihood of future harm to the public. In re Disciplinary Proceeding Against Marshall, 160 Wn.2d 317, 347, 157 P.3d 859 (2007); In re Disciplinary Proceeding Against Poole, 156 Wn.2d 196, 224, 125 P.3d 954 (2006) (aggravating factor of refusal to acknowledge wrongful nature of conduct applied when lawyer refused to acknowledge that his falsification of a document was misconduct, regardless of his belief that an original of the document had been previously created and sent). The Court should disregard Respondent's attempt to rationalize her misconduct and affirm the application of this aggravating factor.

3. The hearing officer and Disciplinary Board properly applied the aggravating factor of substantial experience in the practice of law.

Respondent, who was admitted to practice in 1997, admits that she has substantial experience in the practice of law. RB at 46; BF 58, FF 1. She nevertheless repeatedly argues that the hearing officer and Disciplinary Board erred in applying the aggravating factor of substantial

experience in the practice of law because she "does not have experience in emergency relief." RB at 46; see also RB at 13-14. But Respondent cites no authority for the proposition that this aggravating factor only applies when the lawyer is practicing in the lawyer's routine or common area of practice. As this argument is not supported by citation to legal authority, it need not be considered on appeal. DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the Court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

If the Court considers this argument, it should reject it. First, Respondent admitted she had prior experience with emergency relief. TR 499. Second, to accept her argument, one has to reject the hearing officer's mental state findings. She argues that she "had no experience in filing emergency motions," RB at 46, and as a result submitted to the court a "terribly drafted" order, RB at 18, that inadvertently held the Bransfords in contempt and gave the Fergusons possession of the house. RB at 37. But the hearing officer found that Respondent acted consciously and knowingly after having done legal research on the applicable law. BF 58, FF 9-13, 26. Those findings were supported by substantial evidence.

In any event, after Respondent's more than 10 years of practice,

she should be aware that she should not communicate with a court ex parte when the law requires prior notice and an opportunity to be heard, RPC 3.5(b), that she is required to provide competent representation at all times, RPC 1.1 cmt. 4, and that she should take care not to misrepresent the law and facts to the court, especially during an ex parte proceeding. Carmick, 146 Wn.2d at 595 ("An attorney's duty of candor is at its highest when opposing counsel is not present to disclose contrary facts or expose deficiencies in legal argument."); Poole, 156 Wn.2d at 224-25 (aggravating factor of substantial experience in the practice of law applied to misconduct involving lack of candor and integrity); cf. In re Disciplinary Proceeding Against Day, 162 Wn.2d 527, 549-50, 173 P.3d 915 (2007) (aggravating factor of substantial experience not applied because lawyer's criminal conduct did not involve failure to follow procedures one was required to perform as an attorney).

The Court should affirm the application of this aggravating factor.

4. The Court should apply the aggravating factor of dishonest or selfish motive.

Respondent argues that the Court should apply the mitigating factor of absence of dishonest or selfish motive because she "took on the case to help her brother." RB at 46. But this is actually a ground for applying the converse aggravating factor. Respondent spared no effort to

try and wrest control of the house away from the Bransfords so that her brother could quickly declare bankruptcy and be able to claim a substantial homestead exemption that could not be claimed if he were not in possession. TR 153-59; BF 58, FF 6. Respondent's dishonest conduct, when combined with the familial relationship in play, should lead the Court to find that she acted with a dishonest and selfish motive. Poole II, 164 Wn.2d at 735 (aggravating factor of dishonest or selfish motive applied to violation of RPC 8.4(c) because it was unreasonable to conclude that the lawyer acted dishonestly or selfishly but did not act with the motive to do so).

5. The aggravating and mitigating factors do not provide any reason to depart from the presumptive minimum suspension of six months.

After weighing the aggravating and mitigating factors, the hearing officer concluded that there was no basis to depart from the presumptive sanction of suspension. BF 58 at 14. "A six-month suspension is the accepted minimum term of suspension." Cohen, 150 Wn.2d at 762. But, without reasoning or analysis to support the decision, the hearing officer deviated from the presumptive minimum six-month suspension and recommended a 30-day suspension, apparently relying on Carmick, 146 Wn.2d at 582. BF 58 at 14; BF 70. The Disciplinary Board, also after comparing this case with Carmick, increased the recommendation to a

three-month suspension. BF 77 at 2-3. While the Association supports the Disciplinary Board's three-month suspension recommendation, there are nevertheless insufficient grounds for deviating from the minimum six-month suspension.[8]

A minimal (i.e., six-month) suspension is warranted when "there are either no aggravating factors and at least some mitigating factors, or where the mitigators clearly outweigh any aggravating factors." In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 497, 998 P.2d 833 (2000). Here, the aggravating factors outweigh the single mitigating factor, even if the aggravating factor of dishonest and selfish motive is not added. See, e.g., Whitt, 149 Wn.2d at 721 (determining that no prior discipline history was insufficient to reduce a disbarment sanction where the lawyer showed a pattern of misconduct and made false representations during the course of the disciplinary investigation).

Carmick received a 60-day suspension based on a similar number of aggravating factors and only one slight mitigating factor (harmless delay). 146 Wn.2d at 606-07. But unlike Carmick, Respondent was found

[8] It was improper for the hearing officer and the Disciplinary Board to compare this case with Carmick and recommend a sanction of less than six months based on a proportionality theory because that issue was never presented by Respondent and she never cited Carmick for that purpose. It is the attorney facing discipline who must bring forth cases demonstrating the disproportionality of the sanction imposed. VanDerbeek, 153 Wn.2d at 97. Respondent never did that.

to have violated RPC 8.4(c) based on failing to disclose relevant facts to a court. Her violation of RPC 8.4(c) merits a greater sanction.

In any event, the fact that Carmick received a 60-day suspension does not automatically mean that Respondent should receive a short suspension. Short-term suspensions are an ineffective means of protecting the public. Halverson, 140 Wn.2d at 495 (citing commentary to ABA Standard 2.3). "In reality, a short-term suspension functions as a fine on the lawyer, and fines are not one of the recommended sanctions." Id.

The Court should suspend Respondent for six months.

IV. CONCLUSION

The Court should affirm the conclusions of both the hearing officer and the unanimous Disciplinary Board that Respondent committed the misconduct charged in Counts 1 through 3 of the formal complaint, and suspend her for six months.

RESPECTFULLY SUBMITTED this 19th day of November, 2009.

WASHINGTON STATE BAR ASSOCIATION

M Craig Bray, Bar No. 20821
Disciplinary Counsel

APPENDIX A

Civil Rule 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or

(3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) Writs Abolished--Procedure. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) Procedure on Vacation of Judgment.

(1) *Motion.* Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) *Notice.* Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) *Service.* The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) *Statutes.* Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect.

[Amended effective September 26, 1972; January 1, 1977.]

Civil Rule 65. INJUNCTIONS

(a) Preliminary Injunction.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subsection shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicants attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 14 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that

event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. Except as otherwise provided by statute, no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof. Pursuant to RCW 4.92.080 no security shall be required of the State of Washington, municipal corporations or political subdivisions of the State of Washington.

The provisions of rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and Scope. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Statutes. These rules are intended to supplement and not to modify any statute prescribing the basis for obtaining injunctive relief. These rules shall prevail over statutes if there are procedural conflicts.

[Amended effective July 1, 2004; January 1, 1981; September 1, 1989]

RCW 7.21.010 – Definitions.

The definitions in this section apply throughout this chapter:

(1) "Contempt of court" means intentional:

(a) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;

(b) Disobedience of any lawful judgment, decree, order, or process of the court;

(c) Refusal as a witness to appear, be sworn, or, without lawful authority, to answer a question; or

(d) Refusal, without lawful authority, to produce a record, document, or other object.

(2) "Punitive sanction" means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court.

(3) "Remedial sanction" means a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.

[1989 c 373 § 1.]

RCW 7.21.030 Remedial sanctions -- Payment for losses.

(1) The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related. Except as provided in RCW 7.21.050, the court, after notice and hearing, may impose a remedial sanction authorized by this chapter.

(2) If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:

(a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1) (b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.

(b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.

(c) An order designed to ensure compliance with a prior order of the court.

(d) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

(e) In cases under chapters 13.32A, 13.34, and 28A.225 RCW, commitment to juvenile detention for a period of time not to exceed seven days. This sanction may be imposed in addition to, or as an alternative to, any other remedial sanction authorized by this chapter. This remedy is specifically determined to be a remedial sanction.

(3) The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees.

(4) If the court finds that a person under the age of eighteen years has willfully disobeyed the terms of an order issued under chapter 10.14 RCW, the court may find the person in contempt of court and may, as a sole sanction for such contempt, commit the person to juvenile detention for a period of time not to exceed seven days.

[2001 c 260 § 6; 1998 c 296 § 36; 1989 c 373 § 3.]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re SANDRA L. FERGUSON, Lawyer (Bar No. 27472).	Supreme Court No. 200,719-8 DISCIPLINARY COUNSEL'S DECLARATION OF SERVICE BY MAIL

The undersigned Disciplinary Counsel of the Washington State Bar Association declares that he caused a copy of the Answering Brief of the Washington State Bar Association to be mailed by regular first class mail with postage prepaid on November 19, 2009 to Respondent's lawyer Kurt M. Bulmer at the following address:

KURT M. BULMER
ATTORNEY AT LAW
740 BELMONT PLACE E #3
SEATTLE WA 98102-4442

The undersigned declares under penalty of perjury under the laws of the State of Washington that the foregoing declaration is true and correct.

11/19/2009, Seattle, WA
Date and Place

M Craig Bray, Bar No. 20821
Disciplinary Counsel
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539
(206) 239-2110

ORIGINAL

OFFICE RECEPTIONIST, CLERK

To: Craig Bray
Cc: Kurt Bulmer
Subject: RE: In re Ferguson, Supreme Court No. 200,719-8

Rec. 11-19-09

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Craig Bray [mailto:craigb@wsba.org]
Sent: Thursday, November 19, 2009 12:40 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Kurt Bulmer
Subject: In re Ferguson, Supreme Court No. 200,719-8

Dear Clerk:

Attached for filing are the following documents in the case of In re Sandra L. Ferguson, Supreme Court No. 200,719-8, Bar No. 27472:

1. Answering Brief of the Washington State Bar Association; and
2. Declaration of Mail Service.

Please confirm receipt of these documents. Thank you.

Craig Bray
Disciplinary Counsel
Washington State Bar Association
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2539
(206) 239 2110
craigb@wsba.org